SUMMARY OF ARGUMENT

I

The Conciliation Commissioner fixed the value of the land at $6,000.00 and gave the Debtors one year in which to redeem it. The order required the Creditor to accept that amount for the land within said time. The Creditor rejected the order and attacked it by taking an appeal from the District Court to the Circuit Court of Appeals and tried to overthrow this judgment on its assigned error on the ground that the valuation of the land was too low and should have been higher and that the one year to redeem was too high. That it filed a brief of 15 pages and took all of the steps to perfect said appeal, and assigned as error that the valuation was too low and the time to redeem too long. That it also charged that the granting of one year to redeem was improper and was not provided for by the statute and was arbitrary and unreasonable and argued said questions in their Brief, it filed in said cause. That it carried on this appeal for 15 months and finally the Circuit Court of Appeals affirmed said order below.

II

At the same time there existed a decision of this Court in Branson v. LaCross & Milwaukee R. R. in which said Court held that:

> "They (the Respondent) having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert that the decree is founded in error and for that reason should not be executed, but should be reversed and corrected in the Appellate Tribunal. The appeal suspends the execution of the

decree." Bronson v. The LaCross & Milwaukee R. R., 1 Wall 405 (17 L. Ed. U. S. 616). (Our parentheses.)

III

In 6th Cyc. Fed. Proc. Sec. 2862, p. 341, the Author states the same in the following words:

> "Accordingly, one appealing from a decree or judgment in his own favor supersedes it by so appealing and can not execute it; and subsequent taking of a cross-appeal does not alter the case."

IV

In Kahn v. American Surety Co., 162 S. 339 (335), the Court upheld the Supreme Court as follows:

> "Any Act, judgment which of its own force and effect produces a suspension or stay of proceedings in a cause, is a supersedeas. When we say that an appeal or writ of error acts as a supersedeas, we mean it suspends the proceedings below in the same manner that an order of a supersedeas does."

(Note) If this order could not be executed it was dormant and not running against the debtors. It did not begin to run until the Creditor's attack was ended by the Court of Appeals in affirming the order on October 9, 1942.

V

Also 4th Corpus Juris states:

> "Thus any Act, judgment, or proceedings which of its own force and effect produces a suspension or stay of proceedings, is a supersedeas."

In First National Bank v. State, the Court in 131 F. 430 upheld the Supreme Court as follows:

"The precise point here raised has not been discussed in the National Courts, because the practice adopted by Appellant in the case is virtually unknown; but it has been incidentally referred to in several decisions to the effect that the decree in the District or Circuit Courts, when an appeal is taken therefrom, is suspended until the appeal is disposed of. This rule is frequently stated in Admiralty and other causes."

VI

The decision of the Court of Appeals is in violent conflict with the decision of the Supreme Court in the Bronson case and all of the other authorities set out above and those cited in Rose's Notes to the Supreme Court decisions and it will have to be reversed to restore uniformity of the decision on the point in question. The District Court is a Court of Equity and hence has a wide discretion in seeing the "Distressed farmers" are allowed to redeem.

VII

Rose's Notes to the decisions of the Supreme Court cite a number of cases in support of the decision, but none against it or modifying it, or distinguishing it.

VIII

The order as to the value and time was final at the beginning but when the Debtors, December 8, 1942, out of time, filed their petition to redeem and showed they could redeem, the Creditor appeared and instead of adhering to the order, it took issue on a new cause of action and brought a new cause into the case in this: It demanded a judgment against the Debtors on an entirely new action which had not been in the first hearing, $450.00 on certain stock and $843.00 on rent, and at the first trial obtained

judgment for the same. This action of the Creditor amounted to an abandonment of the order in question and opened it up so as to give the Court jurisdiction to have a new trial to extend the time to redeem and to which gave it power to allow redemption, as the money was in Court at that time.

IX

As shown by the authorities you do not need to appeal from every order entered in bankruptcy. The Court is open and can modify or change any previous order where the litigation is between the parties, as in the instant case.

We quote from Creditor's Brief on its appeal as above as follows:

> "First . . . Since a bankruptcy proceeding, from the filing of the petition to the final settlement of the estate, is but one continuous suit, and since the bankruptcy Court is always open and has no terms, any order of the court may be re-examined and vacated within such pendency unless such vacation would disturb rights which have become vested in reliance upon such order or action." (Appellant's Brief, p. 12.) Brief, p. 12.)
>
> (Kimm v. Cox, 130 F. (2d) 721.)

Enough has been said in this part of the Brief. This decision must be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

RUFUS MESHBERGER AND LELIA B. MESHBERGER, Husband and Wife, *Debtors,* vs. THE FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY, *Respondent.*	No. ———

PETITIONERS' AND DEBTORS' BRIEF IN SUPPORT OF SECOND PARAGRAPH OF PETITION FOR APPEAL, AS OF RIGHT, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Come now the Petitioners and Debtors in the above entitled cause and file with their petition for an appeal, as of right, their Brief in support of said petition and the assignment of errors filed therewith from the judgment of said United States Circuit Court of Appeals to the Supreme Court of the United States on the following grounds:

I

EXPLANATION

(1) That said Petitioners and Debtors, Rufus Meshberger and wife have filed a previous petition in this cause in said Supreme Court for a writ of Certiorari embracing the same proceedings in Bankruptcy in the above cause, asking said Supreme Court to order said Circuit Court of Appeals to send up the record of said proceedings to the Supreme Court to review and correct said proceedings.

II

(1) As to Appeals: In Chandler Act, Sec. 24 (a), June 22, 1938, and Sec. 47a 11 U. S. C. A., it is provided:

> "Sec 24. JURISDICTION OF APPELLATE COURTS.—The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions 'in proceedings in bankruptcy,' either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact." (Quotations ours.)
>
> "Sec. 47. JURISDICTION OF APPELLATE COURTS, Provides:
>
> a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate

jurisdiction from the several courts of bankruptcy in their respective jurisdictions 'in proceedings in bankruptcy,' either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact'':

(2) It will be noted that this defines jurisdiction: "In proceedings in bankruptcy" and "in controversies arising in proceedings in bankruptcy." It will not be disputed but that the "proceedings" in this case come within said Act.

(3) Then provision is made for appealing from the Circuit Court of Appeals to the Supreme Court "in proceedings in Bankruptcy" as follows: In Chandler Act, Sec. 24 (c), June 22, 1938, and Sec. 47 (c) 11 U. S. C. A.

"c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

"c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

(4) Then the Act provides:

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." (Chandler Act, Sec. 24 (b), June 22, 1938.)

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." (Sec. 47 (b), 11 U. S. C. A.)

(5) This Act took the place of the previous provision for a Writ of Error, which was abolished on January 31, 1928. The Act reads as follows:

"ACT OF JANUARY 31, 1928

Chapter 14, 45 Stat. 54

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts." (U. S. Code 1926 to December 3, 1928. See 861a and 861b Revised Rules of the Su-

preme Court of the United States Appendix, page 10.)

"(c) Section 2 of the above Act was amended April 26, 1928, as follows:

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and invoking such relief, including the provisions relating to the appeal which the preceding section substitutes for a writ of error."

"(d) The Act as to Writs of Error reads as follows:

> "This section prior to its amendment read as follows: 'In all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts.' United States Code Compact Ed. to December 3, 1928, after 861b."

On the original transcript of the Record filed in said Court of Appeals which will be filed in this appeal, and that said petition for a writ of certiorari and this petition to appeal, as of right, as provided by the above Acts of Congress, said appellants will ask in both cases that they shall be taken and based upon the same transcript as certified from said Court of Appeals to this Court. That such a plan will make it possible to bring both of said appeals

and to properly present them to the Court without going to the unnecessary expense of procuring and filing two copies of said transcript. And they now ask Court for leave to allow both appeals to be taken in said manner.

III

(1) That in filing the brief in support of the petition for certiorari they have already set out certain general statements and steps which are required by the Rules in such a brief. It would be only repetition to set out said statements the second time.

(2) The matters on page 12 of the Brief in support of the petition for certiorari to Specification IV, page 17, are already before the Court and need not be repeated.

IV

SPECIFICATION OF ERRORS

(1) The specifications of errors have heretofore been set out on page 12 to V Summary of Argument. The petitioners herein have prepared a later form of assignment of errors and it has been printed and covers 17 pages which will be filed with the petition under the direct appeal, as of right. This printed assignment is now before the Court and it will have to be assumed that it will be read by the Court. That hence, it is not necessary to repeat the assignment again.

V

THE ARGUMENT

The following additional argument of points of fact and of law in support of the petition and assignment of errors will be submitted:

(1) We realize it is not an easy matter to present the questions in an appeal and the law applying to them. There are no weak places in the Debtor's case. It is our purpose to present this Act as a bankruptcy law we "are expounding" and how it shall be construed. That the power of Congress providing for this Bankruptcy Act is one of the greatest powers vested in the Congress and is in the class with the power to "coin money and regulate the value thereof" or to declare war or direct an embargo which may cost millions to our citizens.

Norman v. Baltimore, 294 U. S. 240 (79 L. Ed. 885).

(2) This law is different from all others. Like Chief Justice Marshall observed:

> "In considering this question, then, we must never forget that it is a Constitution we are expounding."
>
> McCulloch v. The State of Maryland, 4 Wheaton 316.

(3) There is no dispute but that the Act of Congress of March 3, 1933, as amended by adding a new Subsection (s) August 28, 1935 (11 U. S. C. A. 203 (s)) provided for the following:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt."

Wright v. Union Central (December 9, 1940), (311 U. S. 273). And the Court beneath that statement cited three very recent decisions of the Supreme Court.

(4) The purpose for which a law is passed must be considered—to give it a proper construction. That is the light which should guide the Court. It must also be given a liberal construction to carry out the intent of the Law-giver. If possible a construction which would defeat the purpose of the Act should be avoided and if a more liberal construction which would carry out some great public purpose or public demand for such an Act, such a construction should be adopted. It is not an objection to an Act of the Legislature, that in doing good to the public, private rights may be infringed. Each person on entering Society surrenders part of his private rights for the rights and protection that Society gives him.

(5) Blackstone said on the point of enacting laws and of the great obligation resting on the Courts to enforce them, the following:

"There are three points to be considered in the construction of all remedial statutes; the old law, the mischief and the remedy; that is, how the common law stood at the making of the Act. What the mischief was, for which the common law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the Judges so to construe the Act as to suppress the mischief and advance the remedy." (Introduction Sec. 3 (Star Page 87) bottom page 53, Blackstone's Commentaries on the Laws of England.)(1)

(1) Aside: It is said more copies of this were read in America prior to the Revolution than in England. It must not be forgotten that "Here once the embattled farmers stood, and fired the shot heard round the world."

(6) What was the mischief in our land prior to and at the time our farm mortgage legislation began to be developed? There was no Act of Congress to stop wholesale farm mortgage foreclosures, and it was threatening the stability of our Government.

(7) The Supreme Court said in Wright v. Vinton Branch Bank, March 29, 1937, 300 U. S. 440, that the new legislation (Act of March 3, 1933) and its amendment (by adding a new Sub-section (s) August 28, 1935) was the remedy to cure the mischief in these words: "The Legislation is designed to aid victims of the general economic depression: (Wright v. Vinton Branch Bank, 300 U. S. 440.)

(8) The situation was serious: It will not be disputed but that the State Courts were glutted with suits to foreclose American farm mortgages and the newspapers were full of notices of Sheriff's sales of farm mortgage lands. Thousands of farmers were driven from their farms. This legislation was enacted to stop this and to aid the "distressed farmers" to stay on their farms and to put them on their feet again.

(9) Note that Blackstone further says that it was the duty of the Courts to so construe the Acts as to suppress this evil or mischief and to advance the remedy, a full application of the law. Instead of doing that in this and many other cases, many of the Inferior Federal Courts hunted for technicalities which defeated the purpose of the Acts and retarded the remedy. A law not enforced or applied is a "dead letter". In my opinion it takes greater courage to enforce a law than to enact it. We will show what Blackstone said was the law over 180 years ago was the law when these Courts decided the Wright case December 9, 1940, and on December 2, 1942, when this Court decided the case at Bar.

(10) We have already shown that if that Court had followed that law it would have allowed these farmers to redeem their Homes and ordered the Creditor to accept the $6,000.00 with proper credits and go hence without delay. And the money that this litigation will cost could have been used to put some buildings on the land. (As there are no improvements on the land.)

(11) We have already shown that the Supreme Court stated in Wright v. Union Central, 311 U. S. 273, that the purpose of this legislation was intended as follows:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt."

Citing three former decisions of that great Court.

(12) There never was a clearer description of the condition of the class Congress intended to aid by this new legislation, than given by Justice Douglas in the above opinion. It will stand the test of time. In all fairness Honor Bright Counsel cannot understand how the Inferior Federal Courts could read this language without being greatly impressed by it and that it placed on them the duty, as Mr. Blackstone states, to so construe the Act as to stop this loss of American farm homes or in other words to "suppress" this monster and to advance the remedy (the power of the courts), which was in their hands and that the law would be a "dead letter" without them giving it life by applying it and enforcing it.

(13) This is not all. The Supreme Court saw the above conditions were so threatening to the good of the Country that it would not leave any room for doubt or misunderstanding as to the duties of the lower Courts to give this

law a construction to save American farm homes. It further stated:

> "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. John Hancock Mut. Life Ins. Co. v. Bartels, supra (308 U. S. at p. 186); Borchard v. California Bank, supra (310 U. S. at p. 317). There is no constitutional claim of the creditors to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (John Hancock Mut. Life Ins. Co. v. Bartels, supra; Kalb v. Feuerstein, 308 U. S. 433), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

(14) To whom was the Supreme Court directly speaking in using this clear language? Go examine the great opinions. This Court was not speaking to the parties nor to the Counsel. Who was it addressing? The introduction to the opinion shows that it was speaking to the United States Court of Appeals and the Judges of that Court for the Seventh Circuit, the same Court as the one in this cause. It further appears that the same District Court as in the case at Bar had ordered Mr. Wright's land sold at a public auction in bankruptcy proceedings. And that this Circuit Court of Appeals had approved of the judgment in denying the right to redeem and ordering the land sold.(1) In passing: Did this Court of Appeals ever allow the Debtors to redeem their land under this Act?

---

(1) And this Court had to stop it.

(15) What did the Supreme Court mean? It not only has the power to decide all cases coming before it, but a still greater power to tell the Inferior Federal Courts how to decide them. To tell them what the law is and that confusion in laws means no law. This supervisory power wisely brings about uniformity in the decisions and no limit has been placed on that power. A Federal question may come before a State Court. Local feeling might cause the State Court to lean against the National view. That would soon break down the National character of our Government. In our form of Government there are no state Bankruptcy laws. The power to impair the obligation of a debt and wipe it out was delegated to the Congress of the United States. In the fight against this Act, its opponents tried to use the state laws to defeat this Federal Law by claiming that the States had created property rights, and that this Federal Act violated the Federal Constitution. Many of the Inferior Federal Courts so held.

(16) This Court had exploded that theory in Kalb v. Feuerstein, January 2, 1940 (308 U. S. 433). It will be noticed in that case the State Court was about to take charge of and administer the insolvent Debtors' estate. Then they insisted that this new Act violated the 5th, the 10th, and the 14th Amendments to the Organic Law. This would have killed the law if this Court had not held these amendments were not violated. (Wright v. Union Central 304 U. S. 502, 1940.)

(17) It was in this case that this Court also asserted the Superiority of a Bankruptcy Act over State Laws. It pointed out "That the right of Congress to legislate on the subject of bankruptcies is granted by the Constitution in general terms." That clause 18 of the Constitution gives it the power—"To make all laws which shall be necessary and

proper for carrying into execution of the foregoing powers."

(18) The Court further said in Wright Case, 304 U. S. 502:

"We have held that Section 75 (s) does not unconstitutionally affect the rights of the mortgagee. We do not think the provision for extension of the period of redemption in Section 75 (n) is invalid."

(19) And a further point: "If the Argument is that Congress has no power to alter property rights because the regulation of rights in property is a matter reserved to the States, it is futile. Bankruptcy procedure constantly affects the property rights established by State law." * * * "Property rights do not gain any absolute inviolability in the Bankruptcy Court because created and protected by State Law." (Wright v. Union Central, 304 U. S. 502.)

(20) The Supreme Court had admonished this Court of Appeals to so construe this Act and proceedings to allow the Debtors to redeem. It took the wrong theory and denied them of that right.

(21) It has been urged that this is a harsh law and much opposition has been stirred up against it by other classes of Society. It is true Congress has brought the Bankrupt's debt down to the appraised value of the land. It would not have been a bankruptcy Act if it did not provide for that. It would have not "rehabilitated" the "distressed farmers" who were faced with "the disaster of forced sales" and an "oppressive burden of debt". How else could they have been relieved? There was no other way on earth. It is said even with this remedial Act a half million or more "distressed farmers" gave up the ghost and lost their homes. They turned down the lane for a last time and for

the last time looked on their ancestral Homes, as dear to them as "light and life". Why should any Court refuse to allow them to stay when that is what Congress and this Court ordered them to do? Over a hundred years ago this Court decided that Congress in enacting a law is the Judge of the means it will employ to execute its Constitutional powers. The means it employed here was to allow the farmer to keep his farm at its value. If we had no farm homes we would have no country. "Ill fares the land, to hastening ills a prey, where wealth accumulates and men decay."

(22) Why did this Court of Appeals not construe these Acts and this decision of the Supreme Court in the Wright appeals, and allow the Debtors to redeem? The Court did not consider or realize it was deciding a Bankruptcy case. It ignored the Bankruptcy Act and tried it under other Technical rules clear outside of the Bankruptcy Laws. It tried the case on an erroneous theory of the law. No Court can ever reach the right conclusion by listening to the "song" of the wrong theory. Away with the wrong theory. It leads to destruction and to injustice.

(23) It has not been disputed nor never will be but that the record shows the Creditor took the following steps in the case which overthrew its theory namely:

(24) The first thing is that on February 17, 1941, the Judge of the District Court referred the Federal Land Bank case (the Respondent herein) to Hon. Fred B. Dressel as Supervising Conciliator of said Court "to take and hear the evidence regarding said real estate of this debtor and to fix such value. Also to fix a time in which the Debtor shall redeem said real estate." (R. 30.)

(25) That the second thing was that on May 27, 1941, said Dressel filed his report relative to the value of the real

estate and a period for redemption which report reads in the words and figures following to-wit: (1) (R. 30.)

(26) "It is further ordered that Rufus Meshberger, Debtor, shall redeem within one year from the date of the entry of this order at the value of $6,000.00, the real estate upon which the Federal Land Bank of Louisville, Kentucky, holds a lien as follows to-wit:

> The Northwest quarter of the northwest of section ten (10) and the east half of the northeast quarter of section nine (9) all in Adams County, Indiana." (R. 31.)

(27) The next thing that happened was—did the Land Bank abide by said judgment as to the $6,000.00 value or the one year in which to redeem? No never. It immediately attacked said judgment with all of its fury by an appeal to the Circuit Court of Appeals of the Seventh Circuit.

(28) What were the evidences of that appeal and did it attack the one year order in which to redeem? Here is the Record. We quote:

"August 9, 1941: Notice is hereby given that the Federal Land Bank of Louisville, Kentucky, appeals from a certain order entered in this cause by this Court on the 10th day of July, 1941, which order is in the words and figures as follows to-wit: 'The Appellant believes that by reason of the entry of said order, certain errors were committed by the Court to the prejudice of the Appellant, all of which will in more detail appear in Appellant's points of alleged order which is filed with and accompanies this notice.'" (R. 40.)

(29) The above was followed by the following statement of the Land Bank:

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(1) His action was approved July 10, 1941.

"The Court erred in denying the petition of the Federal Land Bank of Louisville to review the report and order of the Supervising Conciliation Commissioner and in confirming the order the ..... Commissioner because the time given (one year) in the report and order of the ..... Commissioner in which the Debtor could redeem was not reasonable, being too long, ... and the order ..... fixed too low a valuation upon the real estate." (R. 42.)

(30) APPEAL BOND. Know all men by these presents: That we, the Federal Land Bank of Louisville, Kentucky, and Fidelity and Deposit Company of Maryland, Baltimore, Maryland, are held and firmly bound unto the United States of America in the sum of $250.00 to be paid to said Rufus Meshberger, etc. .....

Sealed with our seals and dated this 7th day of August, 1941.

Whereas, the above named, The Federal Land Bank of Louisville, has prosecuted an appeal to the Circuit Court of Appeals for the Seventh Circuit to reverse and order in the above entitled cause by the District Court of the United States for the Northern District of Indiana.

Now the Condition ..... The Federal Land Bank ..... shall secure the payment of the costs if the appeal is dismissed or the judgment.

August 11, 1941.

Signed by THE FEDERAL LAND BANK
OF LOUISVILLE.

(R. 43.)

(31) CREDITORS' PRAECIPE.

"You are hereby requested to make a supplemental transcript of record in this cause to be filed in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant for an appeal allowed in this cause and to include in said transcript of record the following and no other papers or exhibits, to wit:

2. Statement of points of alleged error, filed by The Federal Land Bank of Louisville.

7. Order granting the petition of the Federal Land Bank of Louisville for Appeal.

J. F. Williamson,
John S. Grimes,
Attorneys for Appellant.

The Federal Land Bank of Louisville, Kentucky." (R. 49.)

(32) There is no doubt but that the Federal Land Bank appealed from this judgment which fixed the time at one year to redeem the land and on the ground that the time was too long and the land valued too low. To clinch the matter said Land Bank filed a Brief in said appeal of some 15 pages. (R. 107-122.)

This was the ordinary brief filed under the Rules as follows:

"IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 7871

IN THE MATTER OF RUFUS MESHBERGER, *Debtor,*

THE FEDERAL LAND BANK OF LOUISVILLE,
Appellant,

vs.

RUFUS MESHBERGER,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION, HON. THOMAS W. SLICK, JUDGE.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

NATURE OF THE ACTION

"This is a proceedings under Subsection (s) of Section 75 of the Bankruptcy Act, as amended August 28, 1935, commonly known as the "Frazier Lemcke Act."

"The appeal is taken from an order of the Court below, fixing the value of the property and giving the Debtor a year in which to repurchase the property under the pro-

visions of paragraph (3) of Subsection (s). Appellant asserts that the value fixed was too low and the granting of a year within which to repurchase prior to sale was improper, not being provided for by the statute and at any rate was arbitrary, unreasonable and too long." (R. 108-109.)

(33) "At the hearing upon these petitions evidence was taken." (R. 12-79.) "The Supervising Conciliation Commissioner filed his report and order thereon, on May 27, 1941" (R. 80-82). "The Debtor filed exceptions and petition to review the report and order (R. 82-87) and assignment of errors (R. 81-87). The Federal Land Bank of Louisville also filed exceptions and petition to review. (Supplemental Record.) The petitions to review of the Federal Land Bank of Louisville and the Debtor were denied and the order of the ..... Commissioner was confirmed." (R. 109-110.)

Thomas W. Slick,
Judge U. S. District Court.

"To this order the Federal Land Bank of Louisville filed its notice of petition for appeal." (R. 109-110.) (R. 102-103-107-108.)

(34) CONTESTED ISSUES.

1. "That the report and order were erroneous in giving the Debtor a year from the date of the order in which to redeem the real estate at the appraised price; and (2) That the valuation in the report and order was too low and did not represent the proper valuation of the real estate." (R. 110.)

(35) As to the ruling on the petition for review:

"(1) The Court erred in denying the petition of the Federal Land Bank of Louisville to review the report and

order of the Supervising Conciliation Commissioner, in confirming the order of the Supervising Conciliation Commissioner, because the time given in the report and order of the Supervising Conciliation Commissioner in which the Debtor could redeem was not reasonable, being too long. (R. 110-111.)

"(2) The Court erred in denying the petition of the Federal Land Bank of Louisville to review the report and order of the Supervising Conciliation Commissioner and in confirming the order of the Supervising Conciliation Commissioner, for the reason that said report and order of the Supervising Conciliation Commissioner fixed too low a value on said real estate." (R. 111.)

(36) "PROPOSITION 1".

"The Court was without power to give the Debtor an additional year in which to redeem the real estate at the valuation fixed." (R. 111.)

(37) "2" SECOND ASSIGNED ERROR.

"The Court erred in denying the petition of The Federal Land Bank of Louisville to review the report, ... for the reason that said report of the Supervising Conciliation Commissioner fixed too low a valuation upon the real estate." (R. 111.)

(38) ARGUMENT.

"The granting of the additional year of redemption was not in accordance with the provisions of Subsection (s) of Section 75 for the Bankruptcy Act ....." (R. 113.)

"CREDITOR'S BRIEF MADE THE FOLLOWING STATEMENT:

"The appellant does not contend that the Debtor's right

to redeem at the end of the three years is absolutely foreclosed at midnight on the third anniversary. Clearly, this is an equitable action, and where the Debtor is able to redeem at the fixed valuation the Court has, in its discretion, the right to permit the payment of the redemption price." (R. 115.)

That is an admission that the matter of extending the time was a matter in the last analysis, was in the discretion of the Court to be exercised as deemed necessary to allow the Debtor to redeem, if the money was paid in before the case was closed. That was what was done here.

(39) TO RESUME: The Federal Land Bank fought with "fire and tongs" its appeal from the order in the District Court and Court of Appeals from August 7, 1941, to October 6, 1942 (nearly till "the frost is on the punkin") two years and three months, to lower the Debtors year to redeem and to require him to raise the value of the land above $6,000.00. And what was the result—said Court of Appeals on October 6, 1942:

"IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT"

OCTOBER TERM OF SESSION 1942

No. 7871

"In the Matter of Rufus Meshberger, *Debtor.* The Federal Land Bank of Louisville, Kentucky, *Appellant,* vs. Rufus Meshberger, *Appellee.*	Appeal for District Court of the United States for the Northern District of Indiana, Fort Wayne Division

OCTOBER 9, 1942

"Before Evans, Major and Kerner, Circuit Judges: (R. 129.)

"In view of the lapse of time since the entry of the order appealed from, and which has made moot the various questions raised by appellant, it is ordered and adjudged, that the order appealed from be and is hereby affirmed. It is further ordered that the mandate be issued forthwith." (R. 129.)

(40) To resume: We come to one of the important questions in this appeal. On May 27, 1941, Mr. Dressel had fixed the value of the land at $6,000.00 and the time to redeem at one year from that date. This was finally confirmed by the Court. The Land Bank appealed from that order on August 7, 1941. It presented its appeal and turned and turned "Heaven and Earth" to change that order, to get the land up and the time down, until October 9, 1942 (15 months) before the Court of Appeals affirmed the decision below.

(41) Did the one year of time to redeem run during that appeal or was it dormant until the appeal ended? We will show by a decision of the Supreme Court and other authorities that the effect of the bank in taking said appeal acted as a stay or supersedeas which prevented the Creditor from enforcing the judgment against the Debtor and if he could not execute the order himself it did not run against the Debtor until the appeal was disposed of.

(42) That said question as to whether said year of time ran against the Debtor while the Creditor was prosecuting said appeal, was not presented in said Creditor's appeal as above, nor in the Debtor's appeal as shown in the Record (R. 32 to 40), which was dismissed on October 9, 1942,

the same day the Creditor's appeal was affirmed. (R. 129.) That said question not being before said Court, could not have been decided by it. That the only question presented to said Court of Appeals by said Land Bank was that the valuation of said land was too low and the time given the Debtor to appeal was too long. That said statement of said Court of Appeals as above was as follows:

"That on account of the lapse of time since the entry of the order was made, ... has made moot ..... various questions raised by appellant. That the statement of the Court affirming the order below disposed of said appeal and exhausted the powers of the Court, and said questions not being before said Court it follows, as "the night the day" as to said questions being "moot" is obiter dicta.

(43) The Appellee has gotten itself into a ridiculous position as to its appeal in this: It asserted in appealing from this order—"that the value fixed was too low, that the granting of a year within which to repurchase prior to sale was improper, not being provided for by the statute, and at any rate was arbitrary, unreasonable and too long." (R. 108-109.)

Then after holding the appeal up for 15 months and turning "Heaven and Earth" to nullify this order it turns around and seeks to change its color and claim the year was running against the Debtor during the year from May 27, 1941. It is absurd and unreasonable for the Creditor to do all it could to trample down the order of May 27, 1941, for 15 months, then, claim it was running against the Debtor, when, during the whole of said period it claimed it was void, when its appeal made it impossible for the Creditor to enforce the order. If the Creditor could not execute the order he could not claim it was running against

the Debtors. Hence the time of one year did not begin until the way was cleared by the decision of the Court of Appeals on October 9, 1942. Hence, the petition to redeem was filed in time and the deposit of $6,000.00, March 19, 1943 (R. 94) was made in time and the previous offer of the Responsible Bank December 8, 1942. (R. 59-61.)

(44) We now come to the cases which holds that the Court of Appeals was wrong in denying the Debtors the right to redeem their home. They are as follows:

"We cite Kahn v. American Surety Company (1935), 162 Southern 339 (335) on this point, and quote therefrom the following:

> **'Any Act, judgment or proceeding which of its own force and effect produces a suspension or stay of proceedings in a cause, is a supersedeas. When we say that an appeal or writ of error acts as a supersedeas, we mean that it suspends the proceedings below, in the same manner that an order of a supersedeas does.'**

Also (4th Corpus Juris Sec., Page 1108): Section 625:

> **'A write of supersedeas is an auxiliary process designed to supersede the enforcement of the judgment of the Court below, brought up for review. In modern times the term is often used synonymously with a stay or proceedings with reference both to writ of error and appeal and is employed to designate the effect of an Act or proceeding which of itself suspends the enforcement of a judgment. Thus any Act, judgment, or proceeding which of its own force and effect produces a suspension of stay of proceedings is a supersedeas.'**

We also cite the controlling case on this point. Bronson, etc. v. The LaCross & Milwaukee R. R., 1 Wall. 405 (17 L. Ed. (U. S.) 616) and quote therefrom the following:

'They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert that the decree is founded in error and for that reason should not be executed, but should be reversed and corrected in the appellate's tribunal. The appeal suspends the execution of the decree. Hence, it amounts to a stay or supersedeas.'

We also cite 6th Cyc. Fed. Proc., Section 2862 (p. 341), which applies here as follows:

'Accordingly, one appealing from a decree or judgment in his own favor supersedes it by so appealing, and cannot execute it; and the subsequent taking of a cross-appeal does not alter the case.'" (Appellants Brief, pp. 21-22.)

(45) "I have just examined Rose's Notes on the Bronson case. The latter is in good standing. The Notes cite 131 F. 430. I quote as follows:

'In the First National Bank, et al. v. State National, etc., 131 Fed. Reporter, p. 430, May 2, 1904, the Court said: "The precise point here raised has not been discussed in the National Courts, because the practice adopted by Appellant in the case is virtually unknown; but it has been incidently referred to in several decisions to the effect that the decree in the District or Circuit Court, when an appeal is taken therefrom, is suspended until the appeal is disposed of. This rule is frequently stated in Admiralty and other causes." Court cites 6 Wheat. 194, 203—5 L. Ed. 239—also cites the Bronson case—22 L. Ed. 251—22 L. Ed. 259— 26 L. Ed. 1065—27 L. Ed. 732 and 27 L. Ed. 888.'

Then the Court in this case, 131 F. 430—(431), quotes from the opinion in the Bronson case: 'In Bronson v. Railroad Co., supra, the Court said: "They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the Appellate Tribunal. The Appeal suspends the execution of the decree." (P. 431). In Emsinger v. Powers cited above the Court said, "While the appeal was pending here, although there was no supersedeas, the Circuit Court had no jurisdiction to vacate the decree in pursuance of the prayer of a bill of review, because such relief was beyond its control." '(Bronson case cited 13 So. 920-21) (131 F. 432).

The Bronson case is cited with approval in U. S. v. Ching Dong Ying, 229 F. 813 (816).[1]

"All of the decisions cited in Rose's Notes upholds the Bronson case as the law—that the action of a party in appealing a case amounts to a supersedeas and that judgment cannot be executed while the appeal is pending. If that be true it is dormant and does not run against the Debtor until the appeal is settled." (Assignment of Errors, pp. 16-17).

(46) Thus the ill-considered decision of the Court of Appeals is in the teeth of the following decisions:

Kahn v. American Surety Co., 162 So. 339—4 Corpus Juris, page 1108 Section 625. Bronson v. LaCross & Milwaukee R. R., 1 Wall. 405 (17 L. Ed. (U. S.) 616.) (Leading Case) 6th Cyc. Fed. Proc. Sec. 2862, p. 341, First National Bank v. State National, 131 Fed. Reporter 430 (May 2,

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(1) Strange that with all of this array of authorities, the Court of Appeals did not cite a single case in its favor. It could find none, and hence there were none to cite.

1904), 131 F. 430 (31) U. S. v. Ching Dong Ying, 229 F. 813 (816).

All of the cases cited in Rose's Notes uphold the Bronson case as the law—that the action of a party in appealing a case amounts to a supersedeas and that judgment cannot be executed while the appeal is pending. (Remember here the Respondent appealed from the judgment rendered against it.) If that be true the judgment is made dormant by the appeal and does not run against the Debtor until the appeal is settled, or until the Creditor can enforce its judgment.

(47) True, the Debtors' petition to redeem was filed after the time fixed in the first order on December 8, 1942. Instead of the Creditor standing by the judgment entered May 27, 1941 (and approved July 10, 1941) it ran away from and abandoned it and opened it up for new issues. It neglected to plead res adjudicata but filed a cross-action against the Debtors for $450 on certain stock, to which it had no right, title or interest and also in a cross-action demanded $843 of rent in the hands of the trustee. The authorities hold all it can get is the value of the land, $6000, and that it has no right to a penny more. (Rent R. 62—Stock R. 64.)

And the District Judge, that did not seem to understand it was trying a bankruptcy case, allowed the Creditor the above sums over and above the $6000. (R. 72-73.)

(48) The Court of Appeals held the above judgment was a final judgment. It was prior to the Debtors' petition to redeem. Then the Creditor abandoned it and filed a cross-action for the stock and rent. He did not treat it as a final judgment but opened and deprived it of its finality by abandoning it and bringing in two new questions and obtained a

judgment against the Debtors to the amount of $1,293. After doing that the Creditor cannot then try to bind the Debtors by the first judgment when it refused to abide by that judgment itself. That released the Debtors as to the question of time and gave the Court the discretion to extend the time to redeem. The Debtors had a commitment for the money to finance the $6,000 on December 8, 1942 This was verified by the petition and proven by the evidence at the trial. (R. 59-60.) This promise was made good by paying the $6000 into Court on March 19, 1943. (R. 94.)

The Court did not dispose of the Creditor's efforts to destroy the order as to the value of the land and time of one year, until October 19, 1943. (R. 129.)

It follows that the Court of Appeals had an opportunity to allow them to redeem. There is an old rule of Equity that comes to mind in substance: "A thing is considered done when it should have been done." Applying that rule the payment would date back. Why not? The case was still in Court between the same parties. No rights of others had intervened.

We have shown the jurisdiction of the Court, and the duty of the Court to review this decision and reverse the judgment of the Court of Appeals.

If we have omitted any other proper argument, we reserve the right to supply that later. Other points of law will be found in the assignment of errors already filed.

Wherefore, the Debtors pray the Court to review the decision of said Circuit Court of Appeals, as of right, and to set aside and reverse the judgment rendered in said cause, and to direct said Court below to sustain the Debtors

petition to redeem said real estate at $6000 with proper credits.

Respectfully submitted,

SAMUEL E. COOK,
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ELMER MCCLAIN,
Lima, Ohio,

Counsel for Petitioners.